

June 2013

## **91-A Frequently Asked Questions**

### **Is a Governor's Commission subject to the Right to Know Law?**

Yes. An advisory committee established by the governor by executive order is a "public body" under RSA 91-A. That means, in general, commission meetings must be open to the public and minutes and records must be available for public inspection.

### **What is and what is not meeting?**

A meeting occurs when a quorum of the membership of a public body is convened so all members can communicate contemporaneously for the purpose of discussing or acting upon matters over which the public body has jurisdiction. Even if the convening quorum does not have the purpose to discuss or act on business, a meeting can still occur. E-mail can also constitute a meeting if it is sent to a quorum of the membership and discusses, proposes action on, or announces how a member will vote on a matter within the jurisdiction of the public body.

Chance or social meetings are not meetings under 91-A if they were neither planned nor intended for the purpose of discussing matters related to official business. Additionally, a strategy or negotiation session with respect to collective bargaining, a caucus of officeholders, or a consultation with legal counsel does not constitute a meeting under 91-A.

### **What notice is required for normal and emergency meetings?**

For a regular meeting, notice of the time and place should be posted in two appropriate places at least 24 hours prior to the meeting, excluding Sundays and legal holidays. Notice could also be published in a local newspaper of general circulation at least 24 hours prior to the meeting, excluding Sundays and legal holidays. Governor's Commissions typically post notices of meetings on State House bulletin boards (including in the elevators). If a non-public session is planned during the meeting, the notice must so state.

For an emergency meeting, the nature of the emergency will dictate the type of notice. Notice may be given via a posting on an appropriate bulletin board, over the radio, or directly over the telephone to known interested parties. Diligent efforts should be made to provide notice, and those efforts must be documented in the meeting minutes, along with the rationale for the emergency meeting. If the meeting is adjudicatory, notice must be given to all parties. The location specified in the notice must be available for public attendance.

Any legislative committee meetings must provide notice in accordance with the rules of the House of Representatives or Senate.

Failure to provide notice could result in the meeting being declared invalid, an order enjoining the public body's actions or practices, and/or an order assessing legal costs and fees.

### **What if a member can't attend the meeting?**

Members should be present in person, except for in emergency situations. In such situations, a member may participate electronically, however he or she must be able to communicate with the public body in a contemporaneous manner and the public must be able to discern what the member attending electronically is communicating. Moreover, the member attending electronically must disclose anyone that is present at the place from which the member is participating. The member present electronically is considered present at the meeting for purposes of voting. All votes taken, when a member is present electronically, must be roll call votes. The reason the member is not present in person must be documented in the minutes.

### **What needs to be in our meeting minutes?**

Meeting minutes must include the names of the members present, the names of the people appearing before the public body, a brief description of each subject discussed, and a description of all final decisions made, including all decisions to meet in non-public session. Final decisions also include actions made on motions, even if the motion failed. A clear description of the motion, the person making the motion, and the person seconding the motion should also be included. Additional information may be included, but any information that is put into the minutes could be subject to 91-A.

Minutes must be made available to the public within five (5) business days. No exceptions. Draft versions of minutes can satisfy this requirement until the final minutes are approved, but they must be clearly marked "draft."

### **What if we want to go into non-public session?**

The public body must have the authority to enter a non-public session and it must be done by a roll call vote. The motion to enter non-public session must state the statutory basis for a non-public session. The vote to enter the non-public session is held in public session and recorded in the minutes. Also included in the minutes is the name of each member of the public body and how they voted on the motion to enter the non-public session.

Minutes are still required at non-public sessions and they must be disclosed to the public within 72 hours unless the divulgence of the information would: (1) likely adversely affect the reputation of any person other than a member of the body or agency itself; (2) render the proposed action ineffective; or (3) pertain to terrorism. The determination by two-thirds of the members present not to divulge the information is a "decision" and must be recorded in the minutes, together with the rationale for non-disclosure. The determination need not be disclosed until a majority of the members believe that (1), (2), or (3) no longer apply.

## **What rights does a member of the public have under 91-A?**

91-A gives the public the right to attend meetings. However, 91-A does not convey a right to the public to speak or participate in meetings. That right must emanate from another law or statute.

91-A establishes a floor, not a ceiling, with regard to public access to meetings. A rule or guideline adopted by the public body may require broader public access to meetings than 91-A. Any such rule or guideline shall take precedence over the provisions of 91-A.

Any person may use recording devices. Any public body that experiences this should establish uniform procedures affording a reasonable opportunity to record which does not interfere with or disrupt the conduct of the meeting.

During the regular or business hours of all public bodies, the public has a right to inspect and copy all non-exempt governmental records in the possession, custody, or control of the public body. Public bodies are to maintain their public records in a way that makes them available to the public. Government records can be maintained in electronic form for the same retention or archival periods as the paper counterparts. If a government record is kept longer than the retention or archival period as the paper counterpart, it shall still be available to the public. If an electronic record would fulfill a 91-A request it may not be destroyed, even if exempt from disclosure. An electronic record is considered deleted only if it is not readily accessible to the public body (i.e., moving to the "deleted folder" doesn't constitute deletion.) .

A member of the public is not required to show identification when asking to inspect government records. The person receiving the request can ask for the request to be in writing, but the requester does not have to comply. If the requester does not comply, the receiver of the request should create a written record that includes the date of the request and a description of the specific government records being requested.

If a government record is immediately physically available, the receiver of the request should ask the requester to wait while he or she makes the record available for the requester. The receiver of the request should make a copy for the requester or closely monitor the requester if they are given the original. If the government record is not readily available, the public body has five (5) days to make an initial response. The public body must inform the requester when it expects to be able to complete the retrieval and review needed to determine if governmental records exist, whether the records are subject to disclosure, and when the process is expected to be complete.

Some government records may contain information that must be disclosed and some information that is exempt. The public body may have an obligation to produce the non-exempt portion of the requested record if the exempt portion can be reasonably redacted or separated from the record.

91-A does not require an agency to compile data in the format requested by a member of the public. The records should only be kept in a manner that makes them available to the public. If the public body does not have a regular office or place of business, the records shall be kept in an office of the political subdivision in which the body is located. If the

government records are maintained in electronic format, the public body may copy the records to electronic media instead of creating a hard copy. Also, a public body is not required to create a record where one does not exist. If information is requested in a format that does not exist the agency is not required to create a document in that format.

### **What is exempt from disclosure under 91-A?**

Statutory exemptions to disclosure can be found in 91-A:5.

Other exemptions include: Legal advice from the agency or body's legal counsel, as well as governmental records which are made privileged by the state, court rule, or common law; Documents or information received in a non-public session, if disclosure would frustrate the purpose of a non-public session; The probing of the mental processes of governmental decision-makers; Any disclosure that would effectively prohibit the frank, open, and honest discussion that is necessary to reasoned decision-making; Any notes, or other materials made for personal use that do not have an official purpose; and Preliminary drafts, notes, memoranda, and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of those entities defined in 91-A:1-a.

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